IN THE UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

SEARS, ROEBUCK AND CO., Respondent, - and - LOCAL 881, UNITED FOOD AND COMMERCIAL WORKERS, Charging Party.	Case No. 13-CA-191829 **Respondent's Reply Brief in Support of Its Exceptions**

Introduction

In their Answering Briefs, the General Counsel and the Charging Party advocate an application of the certification-year rule that is malleable and unpredictable, providing no one with guidance and protecting labor organizations rather than workers' free and protected choice. This contravenes the plain language of the National Labor Relations Act, the spirit of the statute, and longstanding principles established in Board case law.

The ALJ concluded that Respondent violated the Act by honoring its employees' request to withdraw recognition because the employees signed their petition making that request three weeks before the end of the certification year, even though Respondent bargained in good faith with the Union throughout the certification year; did not unlawfully assist the employees with the petition; and did not withdraw recognition from the Union until after the certification year expired. (ALJD 11-12; 13:9-12.)

In making this finding, the ALJ held and the General Counsel contends that *Chelsea Industries, Inc.*, 331 NLRB 1648 (2000), requires a conclusion that the withdrawal of recognition was unlawful because the petition was signed before the end of the certification year. (ALJD 13:17-20; G.C. Answering Brief at 3.) *Chelsea Industries* does not require such a conclusion, and if it does, then it should be overruled, and Member Hurtgen's dissenting opinion in that case should be adopted by the Board.

Indeed, there is a post-*Chelsea* case on point and supporting Respondent's position—*LTD Ceramics*, 341 NLRB 86, 88 (2004), in which the Board held that an employer lawfully withdrew recognition after the expiration of the certification year, even though it did so based on a petition signed largely during the certification year. The General Counsel's Answering Brief provides no basis for disregarding *LTD Ceramics*; indeed, the attempt to distinguish *LTD Ceramics* from the case at hand only highlights the problem with accepting the General Counsel's position as current Board law. To accept the position presented in the Answering Brief—that the number of signatures obtained on a petition during the certification year is relevant, as well as the timing of the presentation of a petition signed during the certification year, is relevant to deciding whether the employer may act on the employees' expressed wishes—would create a test with no right answers, one that enables the Board to pick and choose based on a desired outcome. In this case, the General Counsel is attempting to use it to force a union upon employees who have made it clear that they no longer wish to be represented. Such a result is not

supported by precedent and is contrary to the letter and spirit of the Act. Respondent advocates a bright-line rule that places employee free choice front and center and one that is not susceptible to the swings of the political pendulum.

In short, this case presents the Board with an opportunity to clarify existing Board precedent and to overrule any Board precedent that stands in the way of protecting worker choice, the paramount statutory right protected by the Act.

Argument

Section 9(a) of the Act requires that union representation be founded upon majority support among employees within the designated bargaining unit. 29 U.S.C. § 159(a). In keeping with this statutory principle, the Board has held that an employer may withdraw recognition from a union if it has "objective evidence" demonstrating that the union lacks majority support within the bargaining unit. *Levitz Furniture*, 333 NLRB 717, 726 (2001). Respondent had objective evidence here—a petition signed by the majority of the bargaining unit—showing that the Union did not enjoy majority support on December 2, 2016, when Respondent withdrew recognition from the Union. Notwithstanding the holding in *Levitz Furniture*, the ALJ found and the General Counsel contends that Respondent improperly withdrew recognition in this case because the signatures on the petition to remove the Union were obtained before the certification year expired. (ALJD 13:22-25; G.C. Answering Brief at 3-4.) The ALJ's finding and the General Counsel's position in this regard, however, runs contrary to the text and the spirit of the Act and Board precedent.

The certification year is a one-year period following certification of a new union, during which the union is insulated from a formal challenge to its majority status. *See, e.g.*, *Chelsea Indus.*, 331 NLRB at 1648. It is undisputed that Respondent did not withdraw recognition until after the certification year expired. Yet the General Counsel seeks to unjustifiably insulate the Union from challenge for a period longer than the certification year. This is an unsupportable position in light of the Act's focus on majority rule and in light of existing Board law. Indeed, the General Counsel's own explanation of the certification rule makes it clear that the certification year insulates a union only for that one-year period: "it is Board policy to treat a certification under Section 9 of the Act as identifying the statutory bargaining representative with certainty and finality for a period of one year," and "the certification year rule applies for one year following the date of certification." (G.C. Answering Brief at 4.) The General Counsel provides no basis for extending this one-year period.

Despite this, the General Counsel contends that extant Board precedent supports the ALJ's decision. It does not. This is not the holding in *LTD Ceramics*, 341 NLRB 86, 88 (2004), and such a concept is nowhere to be found in the Act. In *LTD Ceramics*, the employer withdrew recognition from the union shortly after the certification year expired, based on a petition signed by 97 of 171 bargaining unit employees. *See id.* at 88. Of the 97 signatures, 49 of them were obtained during the certification year. *See id.* Without the 49 signatures obtained during the certification year, the employees' petition would not have contained enough

signatures even to constitute the showing of interest necessary to conduct a Board-supervised decertification election, much less to justify a withdrawal of recognition. Despite the majority of cards being signed during the certification year, the Board found that the employer lawfully withdrew recognition. *Id.* *LTD Ceramics* requires the same outcome here, given that the signatures in this case were obtained lawfully and just a few weeks before the end of the certification year.

The General Counsel disagrees but cites only distinguishable and irrelevant case law to support its position. (Answering Brief at 3-4.) For example, the General Counsel cites *Brooks v. NLRB*, 348 U.S. 96 (1954), for the position that the Supreme Court has "sanctioned" the certification-year rule, that the "employer must recognize the union for the entire certification year, even if it is presented with evidence of the union's loss of majority," and that "the very reason the certification rule was adopted was to ensure industrial peace for the one year period after an election." (G.C. Answering Brief at 3.) The General Counsel then concludes that "the Respondent is asking the Board to erode the certification year rule in an unlawful manner." (*Id.*) This makes no sense on its face. As explained above, it is undisputed that Respondent took no action during the certification year; thus, the General Counsel's reliance on *Brooks* is misplaced. If anything, *Brooks* supports Respondent's position here. Similarly, the General Counsel's conclusion that Respondent is seeking to "erode" the certification year is contrary to the facts. Respondent did not take any action during the certification year and is not asking the Board to shorten the certification year in any way. In fact, it is undisputed that

the parties bargained in good faith throughout the certification year and that industrial peace was maintained the entire time. (*See generally* ALJD.)

Brooks and the Board's decision in *LTD Ceramics* are both consistent with Respondent's position: the certification year is a bright-line prohibition against formal attempts to remove a union during the year following certification, not a rule preventing employees from performing any work during the certification year that may later be used to decertify the union after the certification year expires. *See*, *e.g., Brooks v. NLRB*, 348 U.S. 96, 97-98 (1954);*Chelsea Indus.*, 331 NLRB at 1650 n.9 (acknowledging the Board's practice of processing a decertification petition based on a showing of interest gathered during the certification year); *Dresser Indus.*, 338 NLRB 1088, 1088 n.2 (1982) (reinstating decertification petition based on a showing of interest gathered during the certification year). Indeed, in *Brooks*, the Supreme Court noted that "what we have said has special pertinence only to the period during which a second election is impossible" and that "the Board has ruled that one year after certification the employer can ask for an election or, if he has fair doubts about the union's continuing majority, he may refuse to bargain further with it." 348 US at 181, 183. These statements from the Supreme Court support Respondent's position that while no formal action could have been taken during the certification year, once the certification year expired, the Union's protection ended and Respondent could withdraw recognition based on the employees' written request to reject the Union.

Further, there is no rational basis for concluding that the employer in *LTD Ceramics* was permitted to withdraw recognition based on a petition signed one day before expiration of the certification year while denying Respondent the ability to honor its employees' wishes expressed in a petition signed just three weeks sooner. Instead, the General Counsel's failed attempts to distinguish *LTD Ceramics* show just how much uncertainty would be created by the ad hoc test the General Counsel seeks to establish:

> In *LTD Ceramics*, the Board found the withdrawal of recognition was not unlawful because the employer actually received the petition after the certification year expired. The evidence also showed that while some of the signatures were obtained on the final day of the union's certification, the majority of the signature were obtained after the expiration of the certification year.
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> In sum, the critical difference between *LTD Ceramics* and this case is that Respondent had receipt of the decertification petition prior to the end of the certification year and all the signatures on this petition were obtained three weeks prior to the expiration of the certification year. (ALJD 4, 6, 7, 8; Tr. 51-52.) For these reasons, General Counsel contends that *LTD Ceramics* is not applicable to the instant case.

(G.C. Answering Brief at 7-8.) In other words, under the General Counsel's position, if only some (but who knows exactly how many) of the signatures had come after the expiration of the certification year, the results would have been different. Similarly, if the petitioner had provided Respondent with the petition 30 minutes after the certification year expired, the result would be different under the General Counsel's test. To accept these alleged distinctions as the basis for ignoring *LTD Ceramics* would not only create unjustifiable uncertainty for employers, unions, and

employees, but it would create a test unsupported by the plain language of the Act, the spirit of the statute, and longstanding principles established in Board case law.

While the majority opinion in *Chelsea Industries* deviates from the principles in *LTD Ceramics*, that case is nevertheless distinguishable and should be overruled in any event. In *Chelsea Industries*, the employees signed and presented the employer with a petition seeking the removal of their union more than two months (not three weeks) before the certification year expired. 331 NLRB at 1648. As a result, the employer met with the union for more than two months during the certification year even while knowing for certain that failure to reach an agreement meant the union was headed out the door. *See id.* at 1653. This is the very scenario the certification year is designed to avoid, but it is one that did not exist here. (ALJD 11-13.)

Moreover, to the extent that the current Board reads *Chelsea Industries* as creating a bright-line rule preventing the withdrawal of recognition based on any petition signed during the certification year, that position is contrary to the text and spirit of the Act and to prior Board precedent as explained by Member Hurtgen in his dissent in *Chelsea Industries*. 360 NLRB 1651-52. For example, Member Hurtgen noted that in *Rock-Tenn*, 315 NLRB 670 (1994), the Board held that "an employer may lawfully announce an intent to withdraw recognition after the end of the certification year, based on evidence within that year." *Id.* (internal quotation marks omitted). The Board should review its holding in *LTD Ceramics*, *Rock-Tenn*, member Hurtgen's dissent in *Chelsea Industries*, and the principles established by

the Supreme Court in *Brooks*, and it should return to fundamental principles laid down in those opinions because those opinions conform to the Act and its call to give voice to the desires of the bargaining unit employees.

Conclusion

The Act is designed to protect, and the Board is designed to effectuate, employee choice with respect to whether or not they wish to be represented by a labor organization. *See* 29 U.S.C. §§ 157, 159(a). Here, the employees' wishes should not be disregarded simply because they signed their petition requesting the Union's ouster a few weeks shy of the end of the certification year. The Board should respect their wishes and protect the intent and spirit of Section 9(a) of the Act by dismissing the Complaint in its entirety and overturning any existing precedent that unjustifiably aids unions at the expense of employees' statutory rights.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing *Respondent's Reply Brief in Support of Its Exceptions* to be e-filed with the National Labor Relations Board and served on the following parties via e-mail on this 13th day of November, 2018:

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